

**BEFORE THE INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA**

INQUIRY CONCERNING A JUDGE,
HON. TERRI-ANN MILLER,
CASE NO. 06-432

SC 07-1985

MOTION TO STRIKE MOTION FOR SUMMARY JUDGMENT

Comes now the Florida Judicial Qualifications Commission and moves that the respondent judge's Motion for Summary Judgment be stricken, and for cause would show:

1. Proceedings before the Florida Judicial Qualifications Commission are governed by the Florida Judicial Qualifications Commission Rules (FJQCR). Article V, Section 12(a)(4), Florida Constitution.
2. Rule 12(b), FJQCR provides, "In all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable *except where inappropriate* or as otherwise provided by these rules." (e.s.)
3. Rule 7(b), FJQCR provides, "The Chair of the Hearing Panel shall dispose of all pretrial motions. These motions may be heard by teleconference or be determined with or without hearings. The Chair's

disposition of motions shall be subject to review by the full Hearing Panel.”

4. These procedural rules, and the policy and practice that have grown from them, make the use of a motion for summary judgment particularly inappropriate in the context of Judicial Qualifications Commission proceedings.

Rule 1.510, Florida Rules of Civil Procedure (FRCP), provides that either the claimant or the defending party may seek summary judgment. A summary judgment motion seeks a final determination of a complaint based upon a showing of items in the record, such as: pleadings, depositions, answers to discovery, admissions, affidavits, and other materials admissible in evidence. If those materials and the pleadings establish that no genuine issue as to any material fact exists, then the moving party is entitled to a judgment as a matter of law.

5. It is readily apparent why summary judgment has never been successfully attempted in Judicial Qualifications Commission proceedings from the foregoing.¹ Since Rule 7(b) FJQCR requires all motions to be ultimately decided by the Hearing Panel as a body,

¹ Only in the recent case, *In re Eriksson*, #07-64, SC07-1648, has a respondent judge filed a Motion for Summary Judgment. It was denied in that case.

summary judgment is a process fundamentally inconsistent with Commission procedures.

The conflict between the Rules of Civil Procedure and the Commission Rules is highlighted when considering the purpose of a motion for summary judgment. It is a legal mechanism designed to avoid submitting groundless complaints to a jury. This process makes no sense compared to the Commission's procedures. In order for formal charges to be filed against a judge, the actions of the judge and the circumstances surrounding the judge's actions have already been submitted to the Investigative Panel of the Commission. The responding judge then is invited to appear to contest or explain the allegations contained in the Notice of Investigation. Only after this hearing, and upon a finding of probable cause, may the Investigative Panel file formal charges. Rule 6(f) FJQCR. Probable cause exists when the facts and circumstances establish a reasonable belief an offense has been committed. *Jenkins v. State*, 978 So.2d 116 (Fla. 2008). By the finding of probable cause, the Investigative Panel has made a determination that the allegations contained in the formal charges are supported by facts sufficient to constitute a violate the Code of Judicial Conduct, and that the testimony of Judge Miller did not refute those allegations.

6. The fact that Rule 1.510, FRCP, makes summary judgment a reciprocal remedy further renders the rule to be inapplicable. If it were not so, the Commission could summarily convict judges of unethical practices. So by the very terms of Rule 1.510, FRCP, the rule is inapplicable to Commission proceedings.
7. As a corollary to this argument, the determination of whether actions of a judge violate the Code of Judicial Conduct is particularly unsuited to a summary judgment. While a motion to dismiss tests the legal sufficiency of a pleading or complaint, a motion for summary judgment cannot properly examine whether discretion was exercised with improper motives or with malicious intent. Even if evidence is uncontroverted, if it is susceptible to varied conclusions, then summary judgment is not properly employed. *Smith v. City of Daytona*, 121 So2d 440 (Fla. 1960). Conflicting inferences concerning intent or understanding are particularly inappropriate for summary judgment. *Bruno v. Destiny Transportation, Inc.*, 921 So2d 836 (Fla. 2d DCA 2006), *Menck v. Driscoll*, 531 So2d 1057 (Fla. 3rd DCA 1988). The disposition of a Motion for Summary Judgment is not governed by a trial judge's opinion of likelihood of success. *Locke v. Bank of Washington County*, 501 So2d 1349 (Fla. 1st DCA 1987).

8. Such a truncated procedure cannot adequately measure whether an action by a judge or a candidate for judicial office that may fall within the letter of the law can still be unethical in its exercise. It cannot gauge how the alleged unethical conduct erodes the public confidence by gaining judicial office by unfair or unjust means. It is inappropriate to adjudicate the actions of a judge in a summary proceeding when the preamble to the Code of Judicial Conduct sets forth that, “Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgressions, whether this is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”
9. Finally, it should be recognized that the framework for making determinations in judicial disciplinary proceedings is set forth in the Florida Constitution. The Constitution vests the Hearing Panel with the duty to make findings and recommendations to the Supreme Court upon evidence obtained through a plenary hearing process. In the context of the present situation, it is important to recognize that only a two-thirds vote of the Hearing Panel is required to recommend removal and merely

a simple majority is enough to recommend discipline. In promulgating its own rules, the Commission recognized that the Chair of the Hearing Panel could dispose of preliminary motions, but any disposition of even preliminary motions *shall* be subject to review by the full Hearing Panel. Thus the Chair is identified as only one member of the composite body. see Rule 7(b), FJQCR. To view the matter otherwise would be akin to allowing a jury foreperson's singular vote to foreclose the remainder of the jury from deliberating. To recognize a summary dismissal of a complaint of judicial misconduct after the Investigative Panel has found probable cause is to create a process that is inconsistent with the constitutional framework and overlooks the roles of the Investigative Panel and the Hearing Panel in the judicial disciplinary process as established by the Florida Constitution and Commission Rules.

Wherefore, based upon the foregoing, the Commission requests that the Motion for Summary Judgment be stricken.

Respectfully Submitted,

JUDICIAL QUALIFICATIONS COMMISSION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US mail to Michael A. Catalano, Esq., Counsel to Hon. Terri-Ann Miller, 1531 N.W. 13th Court Miami, Florida 33125, Hon. J. Preston Silvernail, 2825 Judge Fran Jamieson Way, Viera, FL 32940, and John R. Beranek, Esq., Counsel to Hearing Panel, PO Box 391, Tallahassee, FL 32302, this 19th day of February, 2009.

Michael L. Schneider
General Counsel